

# **WISCONSIN OPEN MEETINGS LAW**

## **A COMPLIANCE GUIDE**

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An informed citizenry is the bedrock of representative government. In order to properly observe, participate in, and critique their government, Wisconsin citizens must be assured that the operations of government occurs in the full light of day. By state law, the Attorney General's office has the responsibility of providing advice regarding this state's Open Meetings Law. By properly educating government officials as to their responsibilities to ensure that Wisconsin's policy of openness in government is achieved, my office hopes to prevent many of the unintentional violations of the law that may occur. By fully informing governmental officials, this office can limit prosecutions to those who violate our Open Meetings Law despite a proper understanding of its requirements.

The purpose of this handbook, therefore, is to offer guidance to government officials on their duties and responsibilities, and to provide information to the public on its rights under the law. In this new edition, commonly asked questions are answered and an overview of the law is provided. Because the handbook is not intended to be a comprehensive interpretation of the law, users should keep in mind that it is only a basic guide. Government officials should direct specific questions to the attorneys advising their governmental bodies. These attorneys are in the best position to discuss the application of the applicable laws to specific facts concerning your meetings.

Our democracy depends on citizens having access to their government. I hope this handbook will assist in achieving that objective.

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# WISCONSIN OPEN MEETINGS LAW

## I. POLICY OF THE OPEN MEETINGS LAW

The State of Wisconsin recognizes the importance of having a public informed about governmental affairs. The state's open meetings law declares that:

In recognition of the fact that a representative government of the American type is dependent upon an informed electorate, it is declared to be the policy of this state that the public is entitled to the fullest and most complete information regarding the affairs of government as is compatible with the conduct of governmental business.

Wis. Stat. § 19.81(1).

The open meetings law creates a presumption that meetings of governmental bodies must be held in open session. *State ex rel. Newspapers v. Showers*, 135 Wis. 2d 77, 97, 398 N.W.2d 154 (1987). Although there are some exemptions to the open session requirement, those exemptions are to be invoked sparingly and only where necessary to protect the public interest. The policy of the open meetings law dictates that governmental bodies convene in closed session only where holding an open session would be incompatible with the conduct of governmental affairs. "Mere government inconvenience is . . . no bar to the requirements of the law." *State ex rel. Lynch v. Conta*, 71 Wis. 2d 662, 678, 239 N.W.2d 313 (1976).

The open meetings law explicitly provides that all of its provisions must be liberally construed to achieve its purposes. This rule of liberal construction applies in all situations, except enforcement actions in which forfeitures are sought. Wis. Stat. § 19.81(4). Public officials must be ever mindful of the policy of openness and the rule of liberal construction in order to ensure compliance with both the letter and spirit of the law.

## II. WHEN DOES THE OPEN MEETINGS LAW APPLY?

The open meetings law applies to every "meeting" of a "governmental body." Wis. Stat. § 19.83. The terms "meeting" and "governmental body" are defined in Wis. Stat. § 19.82(1) and (2).<sup>1</sup>

### A. Definition Of "Governmental Body"

#### 1. Entities that are governmental bodies

##### a. State or local agencies, boards and commissions

The definition of "governmental body" includes a "state or local agency, board, commission, committee, council, department or public body corporate and politic created by constitution, statute, ordinance, rule or order." Wis. Stat. § 19.82(1). This provision focuses on the manner in which a body was created, rather than on the type of authority the body possesses. Purely advisory bodies created by constitution, statute, ordinance, rule or order are therefore subject to the open meetings law. See *State v. Swanson*, 92 Wis. 2d 310, 317, 284 N.W.2d 655 (1979).

The definition includes state or local agencies, boards, commissions and bodies created by the constitution and statutes of the State of Wisconsin, including condemnation commissions created by Wis. Stat. § 32.08, as

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<sup>1</sup>The text of these, and all other, sections of the open meetings law appears in Appendix A.

well as local bodies created by county, city, village or town ordinance. It does not include bodies created solely by federal constitution, statute or rule.

State or local bodies created by “rule or order” are also included in the definition. The term “rule or order” has been liberally construed to include any directive, formal or informal, creating a body and assigning it duties. 78 Op. Att’y Gen. 67, 68-69 (1989). This includes directives from governmental bodies, presiding officers of governmental bodies, or certain governmental officials, such as county executives, mayors or heads of a state or local agency, department or division. *See* 78 Op. Att’y Gen. 67 (1989).

The Wisconsin Attorney General has concluded that the following are state or local agencies, boards, commissions or bodies and thus are “governmental bodies” subject to the open meetings law:

- An advisory committee appointed by the Natural Resources Board, the Secretary of the Department of Natural Resources, or a District Director, Bureau Director or Property Manager of that department. 78 Op. Att’y Gen. 67 (1989).
- A county board of adjusters. Correspondence, June 11, 1984.
- A citizen’s advisory committee appointed by a county executive. Correspondence, November 4, 1986.
- A public inland lake protection and rehabilitation district established by a county or municipality. Correspondence, November 6, 1986.
- A planning commission or zoning board of appeal. Correspondence, May 7, 1991.
- A library board created by local ordinance. Correspondence, December 20, 1993.
- A citizen’s advisory group appointed by the mayor. Correspondence, March 17, 1983.
- A municipal public utility commission managing a city-owned public electric utility. 65 Op. Att’y Gen. 243 (1976).
- A town board, but not an annual town meeting. 66 Op. Att’y Gen. 237 (1977).
- A committee appointed by the school superintendent to consider school library materials. Correspondence, February 10, 1981.
- Departments of formally constituted subunits of the University of Wisconsin system or campus. 66 Op. Att’y Gen. 60 (1977).
- A municipal public utility managing a city-owned public electrical utility. 65 Op. Att’y Gen. 243 (1976).
- A consortium of school districts created by contract under Wis. Stat. § 66.30. I-10-93, October 15, 1993.
- A school district’s strategic-planning team whose creation was authorized and whose duties were assigned to it by the school board. I-29-91, October 17, 1991.
- A deed restriction committee created by resolution of a common council. I-34-90, May 25, 1990.
- An industrial agency created by resolution of county board under Wis. Stat. § 59.071. I-22-90, April 4, 1990.

### **b. Governmental or quasi-governmental corporations**

The definition of “governmental body” also includes a “governmental or quasi-governmental corporation,” except for the Bradley sports center corporation. Wis. Stat. § 19.82(1). The term “governmental or quasi-governmental corporation” includes a corporation created directly by the state Legislature or by some other governmental body pursuant to specific statutory authorization or direction. 66 Op. Att’y Gen. 113, 115 (1977). The Attorney General has, for instance, concluded that a volunteer fire department created by town ordinance is a “governmental body” subject to the open meetings law, correspondence, June 15, 1977; in contrast, a volunteer fire department created by private citizens is not a “governmental body.” 66 Op. Att’y Gen. 113 (1977).

The term “quasi-governmental corporation” also includes a corporation that closely resembles a governmental corporation in function, effect or status, even though the corporation was not created directly by a governmental body. 80 Op. Att’y Gen. 129, 135 (1991). There is no clear-cut test for determining whether a particular corporation resembles a governmental corporation closely enough to be considered “quasi-governmental.”

The fact that a corporation serves a public purpose is not, in itself, sufficient to make a corporation “quasi-governmental.” See 66 Op. Att’y Gen. at 115 (1977). Nor is the fact that a corporation receives most, if not all, of its funding from public sources. See 80 Op. Att’y Gen. at 136 (1991). Thus, in an informal opinion, the Attorney General considered whether the Grant County Economic Development Corporation, a chapter 181 nonstock, nonprofit corporation created by private individuals, was a “quasi-governmental corporation” subject to the open meetings law. Although the corporation served a public purpose and received more than fifty percent of its funding from public sources, the Attorney General concluded that it was not “quasi-governmental” within the meaning of the open meetings law. Correspondence, February 26, 1987. In a subsequent opinion, however, the Attorney General concluded that the Milwaukee Economic Development Corporation, also a chapter 181 nonstock, nonprofit corporation, created by two private citizens and one city employee, fit within the definition of a “quasi-governmental corporation.” 80 Op. Att’y Gen. 129 (1991). The factors the Attorney General considered in reaching that conclusion included: (1) that the corporation’s bylaws reserved four of nine directors’ positions for specified city officials, (2) that all of the corporation’s officers were appointed by the city and (3) that the corporation was housed in city offices, used city equipment and was staffed by city employees. 80 Op. Att’y Gen. at 136 (1991).

### **c. Subunits**

A “formally constituted subunit” of a governmental body is itself a “governmental body” within the definition in Wis. Stat. § 19.82(1). A subunit is a separate, smaller body created by a parent body and composed exclusively of members of the parent body. 74 Op. Att’y Gen. 38, 40 (1985). If, for example, a fifteen member county board appoints a committee consisting of five members of the county board, that committee would be considered a “subunit” subject to the open meetings law. This is true despite the fact that the five-person committee would be smaller than a quorum of the county board.

Groups that include both members and nonmembers of a parent body are not “subunits” of the parent body. Such groups may nonetheless fit within the definition of “governmental body.”

### **d. State Legislature**

Generally speaking, the open meetings law applies to the state Legislature, including the senate, assembly and any committees or subunits of those bodies. Wis. Stat. § 19.87. The law does not apply to any partisan caucus of the senate or assembly. Wis. Stat. § 19.87(3). The open meetings law also does not apply where it conflicts with a rule of the Legislature, senate or assembly. Wis. Stat. § 19.87(2). Additional restrictions are set forth in Wis. Stat. § 19.87.

## **2. Entities that are not governmental bodies**

### **a. Governmental offices held by a single individual**

Since the term “body” connotes a group of individuals, a governmental office held by a single individual is not a “governmental body” within the meaning of the open meetings law. Thus, the open meetings law does not apply to the office of coroner or to inquests conducted by the coroner. 67 Op. Att’y Gen. 250 (1978). Similarly, the Attorney General has concluded that the open meetings law does not apply to an administrative hearing conducted by an individual hearing examiner. Correspondence, December 2, 1980.

### **b. Bodies meeting for collective bargaining**

The definition of “governmental body” explicitly excludes bodies that are formed for or meeting for the purpose of collective bargaining with municipal or state employees under Wis. Stat. ch. 111. A body formed exclusively for the purpose of collective bargaining is not subject to the open meetings law. Wis. Stat. § 19.82(1). A body formed for other purposes, in addition to collective bargaining, is not subject to the open meetings law when conducting collective bargaining. Wis. Stat. § 19.82(1). The Attorney General has, however, advised multi-purpose bodies to comply with the open meetings law, including the requirements for convening in closed session, when meeting for the purpose of forming negotiating strategies to be used in collective bargaining. 66 Op. Att’y Gen. 93, 96-97 (1977). The collective bargaining exclusion does not permit anybody to consider the final ratification or approval of a collective bargaining agreement in closed session. Wis. Stat. § 19.85(3).

### **c. Bodies created by the Wisconsin Supreme Court**

The Wisconsin Supreme Court has held that bodies created by the court, pursuant to its superintending control over the administration of justice, are not governed by the open meetings law. *State ex rel. Lynch v. Dancey*, 71 Wis. 2d 287, 238 N.W.2d 81 (1976). Thus, generally speaking, the open meetings law does not apply to the supreme court or bodies created by the supreme court. In the *Lynch* case, for example, the supreme court held that the former open meetings law, Wis. Stat. § 66.77(1) (1973), did not apply to the Wisconsin Judicial Commission, which is responsible for handling misconduct complaints against judges. Similarly, the Attorney General has indicated that the open meetings law does not apply to the Board of Attorneys Professional Responsibility. OAG 67-79 (July 31, 1979) (unpublished opinion). In addition, in an informal opinion, the Attorney General concluded that the monthly judicial administration meetings of circuit court judges, conducted under the authority of the supreme court’s superintending power over the judiciary, were not subject to the open meetings law. Correspondence, February 28, 2000.

### **d. Ad hoc gatherings**

Although the definition of a governmental body is broad, some gatherings are too loosely constituted to fit the definition. Thus, *Conta* holds that the directive that creates the body must also “confer[] collective power and define[] when it exists.” 71 Wis. 2d at 681. *Showers* adds the further requirement that a “meeting” of a governmental body takes place only if there are a sufficient number of members present to determine the governmental body’s course of action. 135 Wis. 2d at 102. In order to determine whether a sufficient number of members are present to determine a governmental body’s course of action, the membership of the body must be numerically definable. Thus, in an informal opinion, the Attorney General concluded that a loosely constituted group of citizens and local officials instituted by the mayor to discuss various issues related to a dam closure was not a governmental body, because no rule or order defined the group’s membership, and no provision existed for the group to exercise collective power. Correspondence, September 24, 1998.

Any entity that fits within the definition of “governmental body” must comply with the requirements of the open meetings law. In most cases, it is readily apparent whether a particular body fits within the definition. On occasion, there is some doubt. Any doubts as to the applicability of the open meetings law should be resolved in favor of complying with the law’s requirements.



## **B. Definition Of “Meeting”**

A “meeting” is defined as:

[T]he convening of members of a governmental body for the purpose of exercising the responsibilities, authority, power or duties delegated to or vested in the body. If one-half or more of the members of a governmental body are present, the meeting is rebuttably presumed to be for the purpose of exercising the responsibilities, authority, power or duties delegated to or vested in the body. The term does not include any social or chance gathering or conference which is not intended to avoid this subchapter. . . .

Wis. Stat. § 19.82(2). The statute then excepts the following: an inspection of a public works project or highway by a town board; or inspection of a public works project by a town sanitary district; or the supervision, observation, or collection of information about any drain or structure related to a drain by any drainage board. Wis. Stat. § 19.82(2).

People often assume that the open meetings law applies only to gatherings of one-half or more of the members of a governmental body. That is not the case. The Wisconsin Supreme Court has held that the open meetings law applies whenever a gathering of members of a governmental body satisfies two requirements: (1) there is a purpose to engage in governmental business and (2) the number of members present is sufficient to determine the governmental body’s course of action. *Showers*, 135 Wis. 2d at 102.

The first part of the *Showers* test focuses on the purpose for which the members of the governmental body are gathered. They must be gathered to conduct governmental business. *Showers* stressed that “governmental business” refers to any formal or informal action, including discussion, decision or information gathering, on matters within the governmental body’s realm of authority. *Showers*, 135 Wis. 2d at 102-03. Thus, in *State ex rel. Badke v. Greendale Village Bd.*, 173 Wis. 2d 553, 572-74, 494 N.W.2d 408 (1993), the Wisconsin Supreme Court held that the village board conducted a “meeting,” as defined in the open meetings law, when a quorum of the board regularly attended each plan commission meeting to observe the commission’s proceedings on a development plan that was subject to the board’s approval. The court stressed that a governmental body is engaged in governmental business when its members gather to simply hear information on a matter within the body’s realm of authority. *Id.* at 573-74. The members need not actually discuss the matter or otherwise interact with one another to be engaged in governmental business. *Id.* at 574-76. The court also held that the gathering of town board members was not chance or social because a majority of town board members attended plan commission meetings with regularity. *Id.* at 576. In contrast, the court of appeals concluded in *Paulton v. Volkmann*, 141 Wis. 2d 370, 375-77, 415 N.W.2d 528 (Ct. App. 1987), that no meeting occurred where a quorum of school board members attended a gathering of town residents, but did not collect information on a subject the school board had the potential to decide.

The second part of the *Showers* test requires that the number of members present be sufficient to determine the governmental body’s course of action on the business under consideration.

The following addresses some of the most frequently asked questions with respect to whether a gathering constitutes a “meeting” under the open meetings law.

### **1. Simple majority**

Typically, governmental bodies operate under a simple majority rule -- that is, a margin of one vote is sufficient for the body to pass or block a proposal. In that instance, under the *Showers* test and the language in Wis. Stat. § 19.82(2), the open meetings law applies whenever one-half or more of the members of the governmental body gather to discuss or act on matters within the body’s realm of authority. The Attorney General has advised that the concept of a quorum implies the actual presence of a sufficient number of members to conduct business, whether that presence is by physical attendance or by a telecommunications device. Unless the legal authority that created the body and the body’s internal operating procedures permit the use of proxy votes to establish a quorum or to conduct the body’s business, proxy votes should not be used to conduct the body’s business. Correspondence, July 22, 2002.

## **2. Negative quorums**

When a governmental body operates under a super majority rule (a two-thirds majority, for example), less than half of the members of the body could block a proposal by agreeing to vote in opposition to the proposal. A group of sufficient size to block a proposal is called a “negative quorum.” *Showers* made clear that the open meetings law applies when such a group gathers for the purpose of conducting governmental business. *Showers*, 135 Wis. 2d at 101-02. Accordingly, if a governmental body operates under a two-thirds majority rule, the open meetings law applies whenever more than one-third of its members gather to discuss or act on matters within the body’s authority.

## **3. Walking quorums**

The requirements of the open meetings law also extend to walking quorums. A “walking quorum” is a series of gatherings among separate groups of members of a governmental body, each less than quorum size, who agree, tacitly or explicitly, to act uniformly in sufficient number to reach a quorum. *Showers*, 135 Wis. 2d at 92, quoting *Conta*, 71 Wis. 2d at 687. In *Conta*, the supreme court recognized the danger that a walking quorum may produce a predetermined outcome and thus render the publicly-held meeting a mere formality. *Conta*, 71 Wis. 2d at 685-88. The court commented that any attempt to avoid the appearance of a “meeting” through use of a walking quorum is subject to prosecution under the open meetings law. *Conta*, 71 Wis. 2d at 687.

The widespread use of electronic mail and other electronic message technologies creates special dangers for governmental officials trying to comply with the open meetings law. Although two members of a governmental body larger than four members may discuss the body’s business without violating the open meetings law, features like “forward” and “reply to all” common in electronic mail programs deprive a sender of control over the number and identity of the recipients who eventually may have access to the sender’s message. Moreover, because of electronic mail communication, it is quite possible that a quorum of a governmental body may receive the sender’s message – and therefore may receive information on a subject within the body’s jurisdiction – in an almost real-time basis, the way they would receive it in a meeting of the body. Because of the dangers posed by electronic mail, the Attorney General strongly discourages the members of every governmental body from using electronic mail to communicate about issues within the body’s realm of authority. Correspondence, October 3, 2000.

## **4. Telephone conference calls**

Telephone conference calls among members of a governmental body fit within the definition of “meeting” subject to the open meetings law. 69 Op. Att’y Gen. 143 (1980). Under the *Showers* test, therefore, the open meetings law applies to any conference call that: (1) is for the purpose of conducting governmental business and (2) involves a sufficient number of members of the body to determine the body’s course of action on the business under consideration. To comply with the law, a governmental body conducting a meeting by telephone conference call must provide the public with an effective means to monitor the conference. This may be accomplished by broadcasting the conference through speakers located at one or more sites open to the public. 69 Op. Att’y Gen. at 145 (1980). A “walking quorum” by telephone is also governed by the open meetings law.

## **5. Multiple meetings**

When a quorum of the members of one governmental body attend a meeting of another governmental body under circumstances where their attendance is not chance or social, in order to gather information or otherwise engage in governmental business regarding a subject over which they have decisionmaking responsibility, two separate meetings occur, and notice must be given of both meetings. *Badke*, 173 Wis. 2d at 577. The Attorney General has advised that, despite the “separate public notice” requirement of Wis. Stat. § 19.84(4), a single notice can be used, provided that the notice clearly and plainly indicates that a joint meeting will be held and gives the names of each of the bodies involved, and provided that the notice is published and/or posted in each place where meeting notices are generally published or posted for each governmental body involved. Correspondence, March 4, 2003.

## **6. Burden of proof as to existence of a meeting**

The presence of members of a governmental body does not, in itself, establish the existence of a “meeting” subject to the open meetings law. The law provides, however, that if one-half or more of the members of a body are present, the gathering is presumed to be a “meeting.” Wis. Stat. § 19.82(2). The law also exempts any “social or chance gathering” not intended to circumvent the requirements of the open meetings law. Wis. Stat. § 19.82(2). Thus, members of a governmental body may overcome the presumption of a meeting by establishing that they did not discuss or act on business within the governmental body’s authority. If, for example, one-half or more of the members of a governmental body ride to a meeting in the same vehicle, the law presumes that the members conducted a “meeting” which was subject to all of the requirements of the open meetings law. The members of the governmental body may overcome the presumption by proving that they did not discuss or act on any business of the body.

Where a person alleges that a gathering of less than one-half the members of a governmental body was held in violation of the open meetings law, that person has the burden of proving that the gathering constituted a “meeting” subject to the law. *Showers*, 135 Wis. 2d at 102. That burden may be satisfied by proving: (1) that the members gathered to conduct governmental business and (2) that there was a sufficient number of members present to determine the body’s course of action.

Again, it is important to remember that the overriding policy of the open meetings law is to ensure public access to information about governmental affairs. Under the rule of liberally construing the law to ensure this purpose, any doubts as to whether a particular gathering constitutes a “meeting” subject to the open meetings law should be resolved in favor of complying with the provisions of the law.

## **III. WHAT IS REQUIRED IF THE OPEN MEETINGS LAW APPLIES?**

The two most basic requirements of the open meetings law are that a governmental body:

- (1) give advance public notice of each of its meetings, and
- (2) conduct all of its business in open session, unless an exemption to the open session requirement applies.

Wis. Stat. § 19.83.

### **A. Notice Requirements**

Wisconsin Stat. § 19.84, which sets forth the public notice requirements, specifies when, how and to whom notice must be given, as well as what information a notice must contain.

#### **1. To whom and how notice must be given**

The chief presiding officer of a governmental body, or the officer’s designee, must give notice of each meeting of the body to: (1) the public, (2) any members of the news media who have submitted a written request for notice and (3) the official newspaper, designated pursuant to state statute, or if none exists, to a news medium likely to give notice in the area. Wis. Stat. § 19.84(1).

The chief presiding officer may give notice of a meeting to the public by posting the notice in one or more places likely to be seen by the general public. 66 Op. Att’y Gen. at 95 (1977). As a general rule, the Attorney General has advised posting notices at three different locations within the jurisdiction that the governmental body serves. 66 Op. Att’y Gen. at 95 (1977). Alternatively, the chief presiding officer may give notice to the public by paid publication in a news medium likely to give notice in the jurisdiction area the body serves. 63 Op. Att’y Gen. 509, 510-11 (1974). If the presiding officer gives notice in this manner, he or she must ensure that the notice is actually published.

The chief presiding officer must also give notice of each meeting to members of the news media who have submitted a written request for notice. Although this notice may be given in writing or by telephone, 65 Op. Att’y Gen. Preface at v-vi (1976), it is preferable to give notice in writing to help ensure accuracy and so that a record of the notice exists. 65 Op. Att’y Gen. 250, 251 (1976). Governmental bodies cannot charge the news media for providing statutorily required notices of public meetings. 77 Op. Att’y Gen. 312, 313 (1988).

In addition, the chief presiding officer must give notice to the officially designated newspaper or, if none exists, to a news medium likely to give notice in the area. The governmental body is not required to pay for and the newspaper is not required to publish such notice. 66 Op. Att’y Gen. 230, 231 (1977). Note, however, that the requirement to provide notice to the officially designated newspaper is distinct from the requirement to provide notice to the public. If the chief presiding officer chooses to provide notice to the public by paid publication in a news medium, the officer must ensure that the notice is in fact published.

## **2. Contents of notice**

### **a. In general**

Every public notice of a meeting must give the “time, date, place and subject matter of the meeting, including that intended for consideration at any contemplated closed session, in such form as is reasonably likely to apprise members of the public and the news media thereof.” Wis. Stat. § 19.84(2). The notice need not contain a detailed agenda, but because the public is entitled to the fullest and most complete information compatible with the conduct of governmental business, the notice should be specific. This requires that when a member of the governmental body knows in advance of the time notice is given that a matter may come before the body, that matter must be described in the meeting notice. 66 Op. Att’y Gen. 143, 144 (1977). The chief presiding officer of the governmental body is responsible for providing notice, and when he or she is aware of matters which may come before the body, those matters must be included in the meeting notice. 66 Op. Att’y Gen. 68, 70 (1977). In an informal opinion, the Attorney General opined that a chief presiding officer may not avoid liability for a legally deficient meeting notice by assigning to a non-member of the body the responsibility to create and provide a notice that complies with Wis. Stat. § 19.84(2). Correspondence, October 17, 2001.

In formulating descriptions of the subject matter of a meeting, the chief presiding officer should keep in mind that the public is entitled to the best notice that can be given at the time the notice is prepared. A good rule of thumb is to ask whether a person interested in a specific subject would be aware, upon reading the meeting notice, that the subject might be discussed. For example, the court of appeals has held that the subject matter designation “licenses” was specific enough to apprise members of the public that a liquor license would be considered for approval. *State ex rel. H.D. Ent. v. City of Stoughton*, 230 Wis. 2d 480, 486, 602 N.W.2d 72 (Ct. App. 1999). Cf. *Olson v. City of Baraboo*, 2002 WI App 64, 252 Wis. 2d 628, ¶¶ 13-17, 643 N.W.2d 796 (meeting notice that a Joint Review Board would deliberate a resolution was sufficient to notify the public that the board would take action on the resolution). General subject matter designations such as “miscellaneous business,” or “agenda revisions,” or “such other matters as are authorized by law” should be avoided. The Attorney General advised in an informal opinion that if a meeting notice contains a general subject matter designation and a subject that was not specifically noticed comes up at the meeting, a governmental body should refrain from engaging in any information gathering or discussion or from taking any action that would deprive the public of information about the conduct of governmental business. I-5-93, April 26, 1993. Citizen comment periods are the subject of specific legislation, and are discussed separately in Section III.B.3, below.

Another frequently asked question is whether a governmental body may act on a motion for reconsideration of a matter voted on at a previous meeting, if the motion is brought under a general subject matter designation. The Attorney General has advised that a member may move for reconsideration under a general subject matter designation, but that any discussion or action on the motion should be set over to a later meeting for which specific notice of the subject matter of the motion is given. Correspondence, May 5, 1986.

### **b. Closed session**

The notice provision in Wis. Stat. § 19.84(2) requires that if the chief presiding officer or the officer’s designee knows at the time he or she gives notice of a meeting that a closed session is contemplated, the notice must contain the subject matter to be considered in closed session. The notice must contain the specific nature of

the business, as well as the exemption(s) under which the chief presiding officer believes a closed session is authorized. 66 Op. Att’y Gen. at 98 (1977). In *State ex rel. Schaeve v. Van Lare*, 125 Wis. 2d 40, 47, 370 N.W.2d 271 (Ct. App. 1985), the court held that a notice to convene in closed session under Wis. Stat. § 19.85(1)(b) “to conduct a hearing to consider the possible discipline of a public employee” was sufficient.

### **3. Time of notice**

The provision in Wis. Stat. § 19.84(3) requires that every public notice of a meeting be given at least twenty-four hours in advance of the meeting, unless “for good cause” such notice is “impossible or impractical.” If “good cause” exists, the notice should be given as soon as possible and must be given at least two hours in advance of the meeting. Wis. Stat. § 19.84(3).

No Wisconsin court decisions or Attorney General opinions discuss what constitutes “good cause” to provide less than twenty-four-hour notice of a meeting. This provision, like all other provisions of the open meetings law, must be construed in favor of providing the public with the fullest and most complete information about governmental affairs as is compatible with the conduct of governmental business. Wis. Stat. § 19.81(1) and (4). If there is any doubt whether “good cause” exists, the governmental body should provide the full twenty-four-hour notice.

Wisconsin Stat. § 19.84(4) provides that separate notice for each meeting of a governmental body must be given at a date and time reasonably close to the meeting date. A single notice that lists all the meetings that a governmental body plans to hold over a given week, month or year does not comply with the notice requirements of the open meetings law. *See* 63 Op. Att’y Gen. at 513 (1974).

University of Wisconsin departments and their subunits, as well as the Olympic ice training rink, are exempt from the specific notice requirements in Wis. Stat. § 19.84(1)-(4). Those bodies are simply required to provide notice “which is reasonably likely to apprise interested persons, and news media who have filed written requests for such notice.” Wis. Stat. § 19.84(6). Also exempt from the specific notice requirements are certain meetings of subunits of parent bodies held during or immediately before or after a meeting of the parent body. *See* Wis. Stat. § 19.84(6).

## **B. Open Session Requirements**

### **1. Accessibility**

In addition to requiring advance public notice of every meeting of a governmental body, the open meetings law also requires that every meeting of a governmental body initially be convened in “open session.” *See* Wis. Stat. §§ 19.83 and 19.85(1). All business of any kind, formal or informal, must be initiated, discussed and acted upon in “open session,” unless one of the exemptions set forth in Wis. Stat. § 19.85(1) applies. Wis. Stat. § 19.83.

An “open session” is defined in Wis. Stat. § 19.82(3) as “a meeting which is held in a place reasonably accessible to members of the public and open to all citizens at all times.” This provision requires that governmental bodies hold their meetings in rooms that are reasonably calculated to be large enough to accommodate all citizens who wish to attend the meetings. *Badke*, 173 Wis. 2d at 580-81. Absolute access is not, however, required. *Id.* In *Badke*, for instance, the Wisconsin Supreme Court concluded that a village board meeting that was held in a village hall capable of holding 55-75 people was reasonably accessible, although three members of the public were turned away due to overcrowding. *Id.* at 561, 563, 581. Whether the requirement that a meeting be held in a place that is reasonably accessible is met depends on the facts in each individual case. Any doubt as to whether a meeting facility is large enough to satisfy the requirement should be resolved in favor of holding the meeting in a larger facility.

In the case of a state governmental body, “open session” means a building and room that enables access by persons with functional limitations, as defined in Wis. Stat. § 101.13(1). Wis. Stat. § 19.82(3). This provision requires that state governmental bodies hold their meetings in buildings and rooms that are accessible, without assistance, to persons with functional limitations. 69 Op. Att’y Gen. 251 (1980). In order to comply with the spirit of the open meetings law, local bodies should also, whenever possible, meet in buildings and rooms that are accessible without assistance.

The policy of openness and accessibility favors governmental bodies holding their meetings in public places, such as a municipal hall or school, rather than on private premises. *See* 67 Op. Att’y Gen. 125, 127 (1978). The law prohibits meetings on private premises that are not open and reasonably accessible to the public. Wis. Stat. § 19.82(3). Generally speaking, places such as a private room in a restaurant or a dining room in a private club are not considered “reasonably accessible.” A governmental body should meet on private premises only in exceptional cases, where the governmental body has a specific reason for doing so which does not compromise the public’s right to information about governmental affairs.

The policy of openness and accessibility also requires that governmental bodies hold their meetings at locations proximate to the public they serve. Accordingly, the Attorney General has concluded that a school board meeting held forty miles from the district which the school board served was not “reasonably accessible” within the meaning of the open meetings law. Correspondence, May 25, 1977. The Attorney General advises that, in order to comply with the “reasonably accessible” requirement, governmental bodies conduct all their meetings at a location within the district they serve, unless there are special circumstances that make it impossible or impractical to do so. I-29-91, October 17, 1991.

## **2. Tape recording and videotaping**

The open meetings law grants citizens the right to attend and observe meetings of governmental bodies that are held in open session. The open meetings law also grants citizens the right to tape record or videotape open session meetings, as long as doing so does not disrupt the meeting. The law explicitly states that a governmental body must make a reasonable effort to accommodate anyone who wants to record, film or photograph an open session meeting, as long as the activity does not interfere with the meeting. Wis. Stat. § 19.90.

By contrast, members of a governmental body have no right to record a closed meeting under circumstances that might mean its private and secret nature could be violated. If a governmental body desires to record its closed meetings, it should arrange for the security of the records to prevent their improper disclosure. 66 Op. Att’y Gen. 318, 325 (1977).

## **3. Citizen participation**

The open meetings law does not grant citizens a right to participate in meetings of a governmental body. There are, however, a number of state statutes which require governmental bodies to hold public hearings on specific matters. *See* for example, Wis. Stat. § 65.90(4) (requiring public hearing before adoption of a municipal budget) and Wis. Stat. § 66.46(4)(a) (requiring public hearing before creation of a tax incremental finance district). In the absence of such a statute, the governmental body itself is free to determine whether to allow citizen participation at its meetings. A governmental body does not violate the open meetings law by refusing to permit citizens to speak at its meetings or by limiting the degree to which citizens participate.

1997 Wisconsin Act 123, effective May 2, 1998, created Wis. Stat. §§ 19.83(2) and 19.84(2) to allow governmental bodies to receive information from members of the public if the public notice of the meeting designates a period of public comment. The new law also allows a governmental body to discuss, but not to act on, any matter raised by the public during a comment period. Although discussion of a general public comment item is permissible, it is advisable to defer extensive discussion and action on such an item until specific notice of the subject matter of the proposed action can be given.

A frequently asked question concerns who may attend the closed session meetings of a governmental body. In general, the open meetings law gives wide discretion to a governmental body to admit to a closed session anyone whose presence the body determines is necessary for the consideration of the matter that is the subject of the meeting. Correspondence, December 15, 1988. If the governmental body is a subunit of a parent body, the subunit must allow members of the parent body to attend its open session and closed session meetings, unless the rules of the parent body or subunit provides otherwise. Wis. Stat. § 19.89. Where enough non-members of a subunit attend the subunit’s meetings that a quorum of the parent body is present, a meeting of the parent body occurs, and the notice requirements of Wis. Stat. § 19.84 apply. *Badke*, 173 Wis. 2d at 579.

#### **4. Minutes of meetings and recording of votes**

The open meetings law does not require a governmental body to take detailed minutes of its meetings. Other statutes, however, may impose detailed minute-taking requirements. I-20-89, March 8, 1989. *See, e.g.*, Wis. Stat. §§ 61.25(3) (village clerk); 62.09(11)(b) (city clerk); and 59.23(2)(a) (county clerk). It does require a governmental body keep a record of the motions and roll call votes at each meeting of the body. Wis. Stat. § 19.88(3). The recordkeeping requirement can be satisfied if the motions and roll-call votes are recorded and preserved on a tape recording. I-95-89, November 13, 1989. If a member of a governmental body requests that the vote of each member on a particular matter be recorded, a voice vote or a vote by a show of hands is not permissible unless the vote is unanimous and the minutes reflect who is present for the vote. I-95-89, November 13, 1989. The requirement applies to both open and closed session meetings. No secret ballot may be used to determine any election or decision of a governmental body, except the election of officers of a body. Wis. Stat. § 19.88(1). For example, a body cannot vote by secret ballot to fill a vacancy on a city council, 65 Op. Att’y Gen. 131 (1976).

### **IV. WHEN IS IT PERMISSIBLE TO CONVENE IN CLOSED SESSION?**

Every meeting of a governmental body must initially be convened in open session. All business of any kind, formal or informal, must be initiated, discussed and acted upon in open session unless one of the exemptions in Wis. Stat. § 19.85(1) applies. Wis. Stat. § 19.83.

#### **A. Authorized Closed Sessions**

Wisconsin Stat. § 19.85(1) contains thirteen exemptions to the open session requirement which permit, but do not require, a governmental body to convene in closed session. Because the law is designed to provide the public with the most complete information possible regarding the affairs of government, exemptions should be strictly construed. *State ex rel. Hodge v. Turtle Lake*, 180 Wis. 2d 62, 71, 508 N.W.2d 603 (1993). The policy of the open meetings law dictates that the exemptions be invoked sparingly and only where necessary to protect the public interest. If there is any doubt as to whether closure is permitted under a given exemption, the governmental body should hold the meeting in open session. *See* 74 Op. Att’y Gen. 70, 73 (1985).

The following are some of the most frequently cited exemptions.

#### **1. Judicial or quasi-judicial hearings**

Wisconsin Stat. § 19.85(1)(a) authorizes a closed session for “[d]eliberating concerning a case which was the subject of any judicial or quasi-judicial trial or hearing before that governmental body.” In order for this exemption to apply, there must be a “case” that is the subject of a quasi-judicial proceeding. *Turtle Lake*, 180 Wis. 2d at 72. The Wisconsin Supreme Court held that “case” contemplates a controversy among parties that are adverse to one another; it does not include a mere request for a permit. *Id.* at 74. Examples of governmental bodies that consider “cases” and thus can convene in closed session under Wis. Stat. § 19.85(1)(a), where appropriate, include the Wisconsin Employment Relations Commission, 68 Op. Att’y Gen. 171 (1979), boards of zoning appeals, *State ex rel. Cities S. O. Co. v. Bd. of Appeals*, 21 Wis. 2d 516, 537, 124 N.W.2d 809 (1963), and other zoning appeals bodies. *Accord, Dolphin v. Board of Review*, 70 Wis. 2d 403, 411-13, 234 N.W.2d 277 (1975). Boards of review cannot use the exemption of Wis. Stat. § 19.85(1)(a) to close any meeting. Wis. Stat. § 70.47(2m). *See* 65 Op. Att’y Gen. 162, 162 (1976); *cf. Dolphin*, 70 Wis. 2d at 413.

#### **2. Employment and licensing matters**

##### **a. Consideration of dismissal, demotion, discipline, licensing and tenure**

Two of the statutory exemptions to the open session requirement relate specifically to employment or licensing of an individual. The first, Wis. Stat. § 19.85(1)(b), authorizes a closed session for:

Considering dismissal, demotion, licensing or discipline of any public employe or person licensed by a board or commission or the investigation of charges against such person, or considering the grant

or denial of tenure for a university faculty member, and the taking of formal action on any such matter

....

This section explicitly provides that a governmental body may not convene in closed session under this exemption unless the body gives the public employee, person licensed, or faculty member actual notice of any evidentiary hearing and any meeting at which final action may be taken. The notice must state that the person has a right to request that any such hearing or meeting be held in open session. If the person requests an open session, the governmental body may not convene in closed session under Wis. Stat. § 19.85(1)(b) to conduct an evidentiary hearing or take final action. Wis. Stat. § 19.85(1)(b).

Evidentiary hearings may be required by statute, ordinance or rule, by collective bargaining agreement, or by circumstances in which the employee or licensee is the subject of charges that might damage the person's good name, reputation, honor or integrity, or where the government body's action might impose substantial stigma or disability upon the person. 66 Op. Att'y Gen. 211, 214 (1977). Evidentiary hearings are characterized by the formal examination of charges by the taking of testimony, and receiving evidence in support or in defense of specific charges that may have been made. 66 Op. Att'y Gen. at 214 (1977).

In *State ex rel. Epping v. City of Neillsville*, 218 Wis. 2d 516, 581 N.W.2d 548 (Ct. App. 1998), the court of appeals held that Wis. Stat. § 19.85(1)(b) did not require the city to give Epping specific notice of the closed session meetings at which the common council discussed his performance pursuant to Wis. Stat. § 19.85(1)(c) because no final action took place during those closed sessions. Instead, the common council reconvened in open session after the closed session, and voted to terminate Epping's employment.

Nothing in Wis. Stat. § 19.85(1) permits a person who is not a member of the governmental body to demand that the body meet in closed session. The Wisconsin Court of Appeals held that a governmental body was not required to comply with a public employee's request that the body convene in closed session to vote on the employee's dismissal. *State ex rel. Schaeve*, 125 Wis. 2d at 40.

#### **b. Consideration of employment, promotion, compensation and performance evaluations**

The second exemption which relates to employment matters authorizes a closed session for "[c]onsidering employment, promotion, compensation or performance evaluation data of any public employee over which the governmental body has jurisdiction or exercises responsibility." Wis. Stat. § 19.85(1)(c).

The Attorney General has interpreted this exemption to extend to public officers, such as a police chief, who the governmental body has jurisdiction to employ. Correspondence, September 20, 1982. The Attorney General has also concluded that this exemption is sufficiently broad to authorize convening in closed session to interview and consider applicants for positions of employment. Correspondence, September 20, 1982.

An elected official is not considered a "public employee over which the governmental body has jurisdiction or exercises responsibility." Thus, Wis. Stat. § 19.85(1)(c) does not authorize a county board to convene in closed session to consider appointments of county board members to a county board committee. 76 Op. Att'y Gen. 276 (1987). Similarly, the exemption does not authorize a school board to convene in closed session to select a person to fill a vacancy on the school board. 74 Op. Att'y Gen. at 72 (1985). Nor does the exemption authorize a county board or a board committee to convene in closed session for the purposes of screening and interviewing applicants to fill a vacancy in the elected office of county clerk. Correspondence, June 13, 2003.

The language of the exemption refers to a "public employee" rather than to positions of employment in general. The apparent purpose of the exemption is to protect individual employees from having their actions and abilities discussed in public and to protect governmental bodies "from potential lawsuits resulting from open discussion of sensitive information." *Oshkosh Northwestern Co. v. Oshkosh Library Bd.*, 125 Wis. 2d 480, 486, 373 N.W.2d 459 (Ct. App. 1985). It is not the purpose of the exemption to protect a governmental body when it discusses general policies that do not involve identifying specific employees. See 80 Op. Att'y Gen. 176, 177-78 (1992). Thus, Wis. Stat. § 19.85(1)(c) authorizes a closed session to discuss the qualifications of and salary to offer a specific applicant but does not authorize a closed session to discuss the qualifications and salary range for the position in general. 80 Op. Att'y Gen. at 178-82 (1992). The section authorizes closure to determine increases in compensation for specific employees, 67 Op. Att'y Gen. 117, 118 (1978). Similarly, Wis. Stat.



§ 19.85(1)(c) authorizes closure to determine which employees to lay off, or whether to non-renew an employee's contract at the expiration of the contract term, *see* 66 Op. Att'y Gen. at 213 (1977), but not to determine whether to reduce or increase staffing, in general.

### **3. Consideration of financial, medical, social or personal information**

The exemption in Wis. Stat. § 19.85(1)(f) authorizes a closed session for:

Considering financial, medical, social or personal histories or disciplinary data of specific persons, preliminary consideration of specific personnel problems or the investigation of charges against specific persons except where par. (b) applies which, if discussed in public, would be likely to have a substantial adverse effect upon the reputation of any person referred to in such histories or data, or involved in such problems or investigations.

An example is where a state employee was alleged to have violated a state law. *See Wis. State Journal v. U.W. Platteville*, 160 Wis. 2d 31, 38, 465 N.W.2d 266 (Ct. App. 1990). This exemption is not limited to considerations involving public employees. For example, the Attorney General concluded that, in an exceptional case, a school board could convene in closed session under the exemption to interview a candidate to fill a vacancy on the school board if information is expected to damage a reputation, however, the vote should be in open session. 74 Op. Att'y Gen. at 72 (1985).

At the same time, the Attorney General cautioned that the exemption in Wis. Stat. § 19.85(1)(f) is extremely limited. It applies only where a member of a governmental body has actual knowledge of information that will have a substantial adverse effect on the person mentioned or involved. Moreover, the exemption authorizes closure only for the duration of the discussions about the information specified in Wis. Stat. § 19.85(1)(f). Thus, the exemption would not authorize a school board to actually appoint a new member to the board in closed session. 74 Op. Att'y Gen. at 72 (1985).

### **4. Conducting public business with competitive or bargaining implications**

A closed session is authorized for “[d]eliberating or negotiating the purchasing of public properties, the investing of public funds, or conducting other specified public business, whenever competitive or bargaining reasons require a closed session.” Wis. Stat. § 19.85(1)(e). This exemption is not limited to deliberating or negotiating the purchase of public property or the investing of public funds. For example, the Attorney General has determined that the exemption authorized a school board to convene in closed session to develop negotiating strategies for collective bargaining. 66 Op. Att'y Gen. at 96 (1977). (The opinion advised that governmental bodies that are not formed exclusively for collective bargaining comply with the open meetings law when meeting for the purpose of developing negotiating strategy.) Governmental officials must keep in mind, however, that this exemption applies only when “competitive or bargaining reasons require a closed session.” Wis. Stat. § 19.85(1)(e). The exemption is restrictive rather than expansive. Mere inconvenience, delay, embarrassment, frustration or even speculation as to the probability of success would be an insufficient basis to close a meeting. By using the word “require,” the Legislature placed a strong burden on a governmental body considering whether to close a meeting. Correspondence, February 12, 1979. The “competitive or bargaining reasons” exemption permits closed session discussion in situations where the discussion will directly and substantially affect negotiations with a party, but not where the discussions might be one of several factors that indirectly influence the outcome of negotiations with a third party. Correspondence, March 24, 1992. Once a governmental body's bargaining team has reached a tentative agreement, the discussion whether the body should ratify the agreement should be conducted in open session. 81 Op. Att'y Gen. 139, 141 (1994).

### **5. Conferring with legal counsel with respect to litigation**

The exemption in Wis. Stat. § 19.85(1)(g) authorizes a closed session for “[c]onfering with legal counsel for the governmental body who is rendering oral or written advice concerning strategy to be adopted by the body with respect to litigation in which it is or is likely to become involved.”

The presence of the governmental body's legal counsel is not, in itself, sufficient reason to authorize closure under this exemption. The exemption applies only if the legal counsel is rendering advice on strategy to adopt for litigation in which the governmental body is or is likely to become involved.

There is no clear-cut standard for determining whether a governmental body is "likely" to become involved in litigation. Members of a governmental body should rely on the body's legal counsel for advice on whether litigation is sufficiently "likely" to authorize a closed session under Wis. Stat. § 19.85(1)(g).

## **6. Remaining exemptions**

The remaining exemptions in Wis. Stat. § 19.85(1) authorize closure for:

1. Considering applications for probation or parole, or considering strategy for crime detection or prevention. Wis. Stat. § 19.85(1)(d).
2. Specified deliberations by the state council on unemployment insurance and the state council on worker's compensation. Wis. Stat. § 19.85(1)(ee) and (eg).
3. Specified deliberations involving the location of a burial site. Wis. Stat. § 19.85(1)(em).
4. Consideration of requests for confidential written advice from an ethics board. Wis. Stat. § 19.85(1)(h).
5. Considering specified matters related to a business ceasing its operations or laying off employees. Wis. Stat. § 19.85(1)(i).
6. Considering specified financial information relating to the support of a nonprofit corporation operating an ice rink owned by the state. Wis. Stat. § 19.85(1)(j).<sup>2</sup>

## **B. Notice Of Closed Session**

The notice provision in Wis. Stat. § 19.84(2) requires that, if the chief presiding officer of a governmental body is aware that a closed session is contemplated at the time he or she gives public notice of the meeting, the notice must contain the subject matter of the closed session.<sup>3</sup>

If the chief presiding officer was not aware of a contemplated closed session at the time he or she gave notice of the meeting, that does not foreclose a governmental body from going into closed session under Wis. Stat. § 19.85(1) to discuss an item contained in the notice for the open session. 66 Op. Att'y Gen. 106, 108 (1977). In both cases, a governmental body must follow the procedure set forth in Wis. Stat. § 19.85(1) before going into closed session.

## **C. Voting In An Authorized Closed Session**

The Wisconsin Supreme Court has held that Wis. Stat. § 14.90 (1959), a predecessor to the current open meetings law, authorized a governmental body to vote in closed session on matters that were the legitimate subject of deliberation in closed session. *State ex rel. Cities S. O. Co.*, 21 Wis. 2d at 538. The supreme court reasoned that "voting is an integral part of deliberating and merely formalizes the result reached in the deliberating process." *State ex rel. Cities S. O. Co.*, 21 Wis. 2d at 539.

In *State ex rel. Schaeve*, 125 Wis. 2d at 53, the court of appeals commented on the propriety of voting in closed session under the current open meetings law. The court indicated that a governmental body must vote in open session unless an exemption in Wis. Stat. § 19.85(1) expressly authorizes voting in closed session. *Id.* The court's statement was not essential to its holding and it is unclear whether the supreme court would adopt a similar interpretation of the current open meetings law.

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<sup>2</sup>For more detailed information on these exemptions, consult the text of Wis. Stat. § 19.85(1), which appears in Appendix A.

<sup>3</sup>See section III.A.2.b. of this guide for information on how to comply with this requirement.

Given this uncertainty, the Attorney General advises that a governmental body vote in open session, unless the vote is clearly an integral part of deliberations authorized to be conducted in closed session under Wis. Stat. § 19.85(1). Stated another way, a governmental body should vote in open session, unless doing so would compromise the need for the closed session. *Accord, Epping*, 218 Wis. 2d at 524 n.4 (even if deliberations were conducted in an unlawful closed session, a subsequent vote taken in open session could not be voided).

None of the exemptions in Wis. Stat. § 19.85(1) authorize a governmental body to consider in closed session the ratification or final approval of a collective bargaining agreement negotiated by or for the body. Wis. Stat. § 19.85(3); 81 Op. Att’y Gen. 139 (1994).

#### **D. Procedure For Convening In Closed Session**

Every meeting of a governmental body must initially be convened in open session. Wis. Stat. §§ 19.83 and 19.85(1). Before convening in closed session, the governmental body must follow the procedure set forth in Wis. Stat. § 19.85(1) which requires that the governmental body pass a motion, by recorded majority vote, to convene in closed session. If a motion is unanimous, there is no requirement to record the votes individually. *State ex rel. Schaeve*, 125 Wis. 2d at 51. Before the governmental body votes on the motion, the chief presiding officer must announce and record in open session the nature of the business to be discussed and the specific statutory exemption which is claimed to authorize the closed session. 66 Op. Att’y Gen. at 97-98 (1977). Stating the statute section number of the applicable exemption is not sufficient because most exemptions contain a number of subjects within the exemption. Some specificity is needed in describing the subject matter of the contemplated closed meeting so that the members of the governmental body can intelligently vote on the motion to close the meeting. Correspondence, June 29, 1977. The governmental body must limit its discussion in closed session to the business specified in the announcement.

#### **E. Reconvening In Open Session**

A governmental body may not commence a meeting, convene in closed session and subsequently reconvene in open session within twelve hours after completion of a closed session, unless public notice of the subsequent open session is given “at the same time and in the same manner” as the public notice of the prior open session. Wis. Stat. § 19.85(2). The notice need not specify the time the governmental body expects to reconvene in open session if the body plans to reconvene immediately following the closed session. If the notice does specify the time, the body must wait until that time to reconvene in open session.

### **V. WHO ENFORCES THE OPEN MEETINGS LAW AND WHAT ARE ITS PENALTIES?**

#### **A. Enforcement**

Both the Attorney General and the district attorneys have authority to enforce the open meetings law. Wis. Stat. § 19.97(1). In most cases, enforcement at the local level has the greatest chance of success due to the need for intensive factual investigation, the district attorneys’ familiarity with the local rules of procedure and the need to assemble witnesses and material evidence. 65 Op. Att’y Gen. Preface at ii (1976).

A district attorney has authority to enforce the open meetings law only after an individual files a verified open meetings law complaint with the district attorney. *See* Wis. Stat. § 19.97(1). Actions to enforce the open meetings law need not be preceded by a notice of claim. *State ex rel. Auchinleck v. Town of LaGrange*, 200 Wis. 2d 585, 594-97, 547 N.W.2d 587 (1996). The complaint must be signed by the individual and notarized.<sup>4</sup> The district attorney has broad prosecutorial discretion. *State v. Karpinski*, 92 Wis. 2d 599, 607, 285 N.W.2d 729 (1979).

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<sup>4</sup>A model complaint appears in Appendix B.

If the district attorney refuses to commence an open meetings law enforcement action or otherwise fails to act within twenty days of receiving a complaint, the individual who filed the complaint has a right to bring an action, in the name of the state, to enforce the open meetings law. Wis. Stat. § 19.97(4). *See also Fabyan v. Achtenhagen*, 2002 WI App 214, 257 Wis. 2d 310, ¶¶ 10-13, 652 N.W.2d 649 (complaint under Wis. Stat. § 19.97 must be brought in the name of and on behalf of the state; *i.e.*, the caption must bear the title “State ex rel. . . ,” or the court lacks competency to proceed). If the individual prevails, the court is authorized to award the person the actual and necessary costs of prosecution, including reasonable attorney fees. Under certain circumstances, the Attorney General may elect to prosecute complaints involving a matter of statewide concern. Court proceedings to enforce the open meetings law must be commenced within two years after the cause of action accrues, or the proceedings will be barred. *State ex rel. Leung v. City of Lake Geneva*, 2003 WI App 129, \_\_\_ Wis. 2d \_\_\_, ¶ 6, 666 N.W.2d 104.

## **B. Penalties**

Any member of a governmental body who “knowingly” attends a meeting held in violation of the open meetings law, or otherwise violates the law, is subject to a forfeiture of between \$25 and \$300 for each violation. Wis. Stat. § 19.96. Any forfeiture obtained in an action brought by the district attorney is awarded to the county. Wis. Stat. § 19.97(1). Any forfeiture obtained in an action brought by the Attorney General or a private citizen is awarded to the state. Wis. Stat. § 19.97(1), (2) and (4).

The Wisconsin Supreme Court has defined “knowingly” as not only positive knowledge of the illegality of a meeting, but also awareness of the high probability of the meeting’s illegality or conscious avoidance or awareness of the illegality. *Swanson*, 92 Wis. 2d at 319. The court also held that knowledge is not required to impose forfeitures on an individual for violating the open meetings law by means other than attending a meeting held in violation of the law. Examples of “other violations” are failing to give the required public notice of a meeting or failing to follow the procedure for closing a session. *Swanson*, 92 Wis. 2d at 321.

A member of a governmental body who is charged with knowingly attending a meeting held in violation of the law may raise one of two defenses: (1) that the member made or voted in favor of a motion to prevent the violation or (2) that the member’s votes on all relevant motions prior to the violation were inconsistent with the cause of the violation. Wis. Stat. § 19.96.

A member who is charged with a violation other than knowingly attending a meeting held in violation of the law may be permitted to raise the additional statutory defense that the member did not act in his or her official capacity. In addition, in *Swanson*, 92 Wis. 2d at 319, and *Turtle Lake*, 180 Wis. 2d at 80, the supreme court intimated that a member of a governmental body can avoid liability if he or she can factually prove that he or she relied, in good faith and in an open and unconcealed manner, on the advice of counsel whose statutory duties include the rendering of legal opinions as to the actions of the body. *See State v. Tereschko*, 2001 WI App 146, 246 Wis.2d 671, ¶¶ 9-10, 630 N.W.2d 277 (unpublished opinion declining to find a knowing violation where school board members relied on the advice of counsel in going into closed session); *State v. Davis*, 63 Wis. 2d 75, 82, 216 N.W.2d 31 (1974) (interpreting Wis. Stat. § 946.13(1) (private interest in public contract). *Cf. Journal/Sentinel v. Shorewood School Bd.*, 186 Wis. 2d 443, 452-55, 521 N.W.2d 165 (Ct. App. 1994) (school board may not avoid duty to provide public records by delegating the creation and custody of the record to its attorneys).

A governmental body may not reimburse a member for a forfeiture incurred as a result of a violation of the law, unless the enforcement action involved a real issue as to the constitutionality of the open meetings law. 66 Op. Att’y Gen. 226 (1977). Although it is not required to do so, a governmental body may reimburse a member for his or her reasonable attorney fees in defending against an enforcement action and for any plaintiff’s attorney fees that the member is ordered to pay. The city attorney may represent city officials in open meetings law enforcement actions. 77 Op. Att’y Gen. 177, 180 (1988).

In addition to the forfeiture penalty, Wis. Stat. § 19.97(3) provides that a court may void any action taken at a meeting held in violation of the open meetings law if the court finds that the interest in enforcing the law outweighs any interest in maintaining the validity of the action. Thus, in *Turtle Lake*, 180 Wis. 2d at 75-76, the court voided the Town Board’s denial of a permit, taken after an unauthorized closed session deliberation about whether to grant or deny the permit. *Cf. Epping*, 218 Wis. 2d 524 n.4 (arguably unlawful closed session

deliberation does not provide basis for voiding subsequent open session vote; *State ex rel. Ward v. Town of Nashville*, 2001 WI App 224, 247 Wis. 2d 988, ¶ 30, 635 N.W.2d 26 (unpublished opinion declining to void an agreement made in open session, where the agreement was the product of three years of unlawfully closed meetings). A court may award any other appropriate legal or equitable relief, including declaratory and injunctive relief. Wis. Stat. § 19.97(2).

In enforcement actions seeking forfeitures, the provisions of the open meetings law must be narrowly construed due to the penal nature of forfeiture. In all other actions, the provisions of the law must be liberally construed to ensure the public's right to "the fullest and most complete information regarding the affairs of government as is compatible with the conduct of governmental business." Wis. Stat. § 19.81(1) and (4). Thus, it is advisable to prosecute forfeiture actions separately from actions seeking other types of relief under the open meetings law.

## CONCLUSION

In this handbook, the Attorney General's Office has outlined the provisions of the open meetings law to serve as an informational resource for members of the public and government officials. Questions which remain after thorough examination of the handbook may be answered by direct consultation of the open meetings statutes, case law, opinions of the Attorney General and by conferring with attorneys for governmental bodies. In addressing such questions, keep in mind the policy of broadly construing the open meetings law in favor of openness. In the rare instance where a question cannot be resolved in this manner, written requests for advice also may be made to the Attorney General's Office for an interpretation of the statutes. Wis. Stat. § 19.98.

# **APPENDIX A**

## **OPEN MEETINGS LAW**

**Wis. Stat. §§ 19.81 - 19.98 (1999-2000)**

## SUBCHAPTER V

### OPEN MEETINGS OF GOVERNMENTAL BODIES

19.81 Declaration of policy. (1) In recognition of the fact that a representative government of the American type is dependent upon an informed electorate, it is declared to be the policy of this state that the public is entitled to the fullest and most complete information regarding the affairs of government as is compatible with the conduct of governmental business.

(2) To implement and ensure the public policy herein expressed, all meetings of all state and local governmental bodies shall be publicly held in places reasonably accessible to members of the public and shall be open to all citizens at all times unless otherwise expressly provided by law.

(3) In conformance with article IV, section 10, of the constitution, which states that the doors of each house shall remain open, except when the public welfare requires secrecy, it is declared to be the intent of the legislature to comply to the fullest extent with this subchapter.

(4) This subchapter shall be liberally construed to achieve the purposes set forth in this section, and the rule that penal statutes must be strictly construed shall be limited to the enforcement of forfeitures and shall not otherwise apply to actions brought under this subchapter or to interpretations thereof.

19.82 Definitions. As used in this subchapter:

(1) "Governmental body" means a state or local agency, board, commission, committee, council, department or public body corporate and politic created by constitution, statute, ordinance, rule or order; a governmental or quasi-

governmental corporation except for the Bradley center sports and entertainment corporation; a local exposition district under subch. II of ch. 229; a family care district under s. 46.2895; a nonprofit corporation operating the Olympic ice training center under s. 42.11 (3); or a formally constituted subunit of any of the foregoing, but excludes any such body or committee or subunit of such body which is formed for or meeting for the purpose of collective bargaining under subch. I, IV or V of ch. 111.

(2) "Meeting" means the convening of members of a governmental body for the purpose of exercising the responsibilities, authority, power or duties delegated to or vested in the body. If one-half or more of the members of a governmental body are present, the meeting is rebuttably presumed to be for the purpose of exercising the responsibilities, authority, power or duties delegated to or vested in the body. The term does not include any social or chance gathering or conference which is not intended to avoid this subchapter, any gathering of the members of a town board for the purpose specified in s. 60.50(6), any gathering of the commissioners of a town sanitary district for the purpose specified in s. 60.77(5)(k) or any gathering of the members of a drainage board created under s. 88.16, 1991 stats., or under s. 88.17, for a purpose specified in s. 88.065(5)(a).

(3) "Open session" means a meeting which is held in a place reasonably accessible to members of the public and open to all citizens at all times. In the case of a state governmental body, it means a meeting which is held in a building and room thereof which enables access by persons with functional limitations, as defined in s. 101.13(1).

19.83 Meetings of governmental bodies. (1) Every meeting of a governmental body shall be preceded by public notice as provided in s. 19.84, and shall be held in open session. At any meeting of a governmental body, all discussion shall be held and all action of any kind, formal or informal, shall be initiated, deliberated upon and acted upon only in open session except as provided in s. 19.85.

(2) During a period of public comment under s. 19.84 (2), a governmental body may discuss any matter raised by the public.

19.84 Public notice. (1) Public notice of all meetings of a governmental body shall be given in the following manner:

(a) As required by any other statutes; and

(b) By communication from the chief presiding officer of a governmental body or such person's designee to the public, to those news media who have filed a written request for such notice, and to the official newspaper designated under ss. 985.04, 985.05 and 985.06 or, if none exists, to a news medium likely to give notice in the area.

(2) Every public notice of a meeting of a governmental body shall set forth the time, date, place and subject matter of the meeting, including that intended for consideration at any contemplated closed session, in such form as is reasonably likely to apprise members of the public and the news media thereof. The public notice of a meeting of a governmental body may provide for a period of public comment, during which the body may receive information from members of the public.

(3) Public notice of every meeting of a governmental body shall be given at least 24 hours prior to the commencement of such meeting unless for good cause such notice is

impossible or impractical, in which case shorter notice may be given, but in no case may the notice be provided less than 2 hours in advance of the meeting.

(4) Separate public notice shall be given for each meeting of a governmental body at a time and date reasonably proximate to the time and date of the meeting.

(5) Departments and their subunits in any university of Wisconsin system institution or campus and a nonprofit corporation operating the Olympic ice training center under s. 42.11(3) are exempt from the requirements of subs. (1) to (4) but shall provide meeting notice which is reasonably likely to apprise interested persons, and news media who have filed written requests for such notice.

(6) Notwithstanding the requirements of s. 19.83 and the requirements of this section, a governmental body which is a formally constituted subunit of a parent governmental body may conduct a meeting without public notice as required by this section during a lawful meeting of the parent governmental body, during a recess in such meeting or immediately after such meeting for the purpose of discussing or acting upon a matter which was the subject of that meeting of the parent governmental body. The presiding officer of the parent governmental body shall publicly announce the time, place and subject matter of the meeting of the subunit in advance at the meeting of the parent body.

19.85 Exemptions. (1) Any meeting of a governmental body, upon motion duly made and carried, may be convened in closed session under one or more of the exemptions provided in this section. The motion shall be carried by a majority vote in such manner that the vote of each member is ascertained and recorded in the minutes. No motion to convene in closed session may be adopted



unless the chief presiding officer announces to those present at the meeting at which such motion is made, the nature of the business to be considered at such closed session, and the specific exemption or exemptions under this subsection by which such closed session is claimed to be authorized. Such announcement shall become part of the record of the meeting. No business may be taken up at any closed session except that which relates to matters contained in the chief presiding officer's announcement of the closed session. A closed session may be held for any of the following purposes.

(a) Deliberating concerning a case which was the subject of any judicial or quasi-judicial trial or hearing before that governmental body.

(b) Considering dismissal, demotion, licensing or discipline of any public employe or person licensed by a board or commission or the investigation of charges against such person, or considering the grant or denial of tenure for a university faculty member, and the taking of formal action on any such matter; provided that the faculty member or other public employe or person licensed is given actual notice of any evidentiary hearing which may be held prior to final action being taken and of any meeting at which final action may be taken. The notice shall contain a statement that the person has the right to demand that the evidentiary hearing or meeting be held in open session. This paragraph and par. (f) do not apply to any such evidentiary hearing or meeting where the employe or person licensed requests that an open session be held.

(c) Considering employment, promotion, compensation or performance evaluation data of any public employe over which the governmental body has jurisdiction or exercises responsibility.

(d) Except as provided in s. 304.06 (1) (eg) and by rule promulgated under s. 304.06 (1) (em), considering specific applications of probation, extended supervision or parole, or considering strategy for crime detection or prevention.

(e) Deliberating or negotiating the purchasing of public properties, the investing of public funds, or conducting other specified public business, whenever competitive or bargaining reasons require a closed session.

(ee) Deliberating by the council on unemployment insurance in a meeting at which all employer members of the council or all employee members of the council are excluded.

(eg) Deliberating by the council on worker's compensation in a meeting at which all employer members of the council or all employee members of the council are excluded.

(em) Deliberating under s. 157.70 if the location of a burial site, as defined in s. 157.70(1)(b), is a subject of the deliberation and if discussing the location in public would be likely to result in disturbance of the burial site.

(f) Considering financial, medical, social or personal histories or disciplinary data of specific persons, preliminary consideration of specific personnel problems or the investigation of charges against specific persons except where par. (b) applies which, if discussed in public, would be likely to have a substantial adverse effect upon the reputation of any person referred to in such histories or data, or involved in such problems or investigations.

(g) Conferring with legal counsel for the governmental body who is rendering oral or written advice concerning strategy to be adopted by the body with respect to

litigation in which it is or is likely to become involved.

(h) Consideration of requests for confidential written advice from the ethics board under s. 19.46(2), or from any county or municipal ethics board under s. 19.59(5).

(i) Considering any and all matters related to acts by businesses under s. 560.15 which, if discussed in public, could adversely affect the business, its employees or former employees.

(j) Considering financial information relating to the support by a person, other than an authority, of a nonprofit corporation operating the Olympic ice training center under s. 42.11(3), if the information is exempt from disclosure under s. 42.115 or would be so exempt were the information to be contained in a record. In this paragraph, “authority” and “record” have the meanings given under s. 19.32.

(2) No governmental body may commence a meeting, subsequently convene in closed session and thereafter reconvene again in open session within 12 hours after completion of the closed session, unless public notice of such subsequent open session was given at the same time and in the same manner as the public notice of the meeting convened prior to the closed session.

(3) Nothing in this subchapter shall be construed to authorize a governmental body to consider at a meeting in closed session the final ratification or approval of a collective bargaining agreement under subch. I, IV or V of ch. 111 which has been negotiated by such body or on its behalf.

19.86 Notice of collective bargaining negotiations. Notwithstanding s. 19.82(1), where notice has been given by either party to a collective bargaining agreement under subch. IV or V of ch. 111 to reopen such

agreement at its expiration date, the employer shall give notice of such contract reopening as provided in s. 19.84(1)(b). If the employer is not a governmental body, notice shall be given by the employer’s chief officer or such person’s designee. This section does not apply to a nonprofit corporation operating the Olympic ice training center under s. 42.11(3).

19.87 Legislative meetings. This subchapter shall apply to all meetings of the senate and assembly and the committees, subcommittees and other subunits thereof, except that:

(1) Section 19.84 shall not apply to any meeting of the legislature or a subunit thereof called solely for the purpose of scheduling business before the legislative body; or adopting resolutions of which the sole purpose is scheduling business before the senate or the assembly.

(2) No provision of this subchapter which conflicts with a rule of the senate or assembly or joint rule of the legislature shall apply to a meeting conducted in compliance with such rule.

(3) No provision of this subchapter shall apply to any partisan caucus of the senate or any partisan caucus of the assembly, except as provided by legislative rule.

(5) Sections 893.80 and 893.82 do not apply to actions commenced under this section.

(4) Meetings of the senate or assembly committee on organization under s. 71.78(4)(c) or 77.61(5)(b)3 shall be closed to the public.

19.88 Ballots, votes and records. (1) Unless otherwise specifically provided by statute, no secret ballot may be utilized to determine any election or other decision of a

governmental body except the election of the officers of such body in any meeting.

(2) Except as provided in sub. (1) in the case of officers, any member of a governmental body may require that a vote be taken at any meeting in such manner that the vote of each member is ascertained and recorded.

(3) The motions and roll call votes of each meeting of a governmental body shall be recorded, preserved and open to public inspection to the extent prescribed in subch. II of ch. 19.

19.89 Exclusion of members. No duly elected or appointed member of a governmental body may be excluded from any meeting of such body. Unless the rules of a governmental body provide to the contrary, no member of the body may be excluded from any meeting of a subunit of that governmental body.

19.90 Use of equipment in open session. Whenever a governmental body holds a meeting in open session, the body shall make a reasonable effort to accommodate any person desiring to record, film or photograph the meeting. This section does not permit recording, filming or photographing such a meeting in a manner that interferes with the conduct of the meeting or the rights of the participants.

19.96 Penalty. Any member of a governmental body who knowingly attends a meeting of such body held in violation of this subchapter, or who, in his or her official capacity, otherwise violates this subchapter by some act or omission shall forfeit without reimbursement not less than \$25 nor more than \$300 for each such violation. No member of a governmental body is liable under this subchapter on account of his or her attendance at a meeting held in violation of this subchapter if he or she makes or votes in favor of a motion to prevent the

violation from occurring, or if, before the violation occurs, his or her votes on all relevant motions were inconsistent with all those circumstances which cause the violation.

19.97 Enforcement. (1) This subchapter shall be enforced in the name and on behalf of the state by the attorney general or, upon the verified complaint of any person, by the district attorney of any county wherein a violation may occur. In actions brought by the attorney general, the court shall award any forfeiture recovered together with reasonable costs to the state; and in actions brought by the district attorney, the court shall award any forfeiture recovered together with reasonable costs to the county.

(2) In addition and supplementary to the remedy provided in s. 19.96, the attorney general or the district attorney may commence an action, separately or in conjunction with an action brought under s. 19.96, to obtain such other legal or equitable relief, including but not limited to mandamus, injunction or declaratory judgment, as may be appropriate under the circumstances.

(3) Any action taken at a meeting of a governmental body held in violation of this subchapter is voidable, upon action brought by the attorney general or the district attorney of the county wherein the violation occurred. However, any judgment declaring such action void shall not be entered unless the court finds, under the facts of the particular case, that the public interest in the enforcement of this subchapter outweighs any public interest which there may be in sustaining the validity of the action taken.

(4) If the district attorney refuses or otherwise fails to commence an action to enforce this subchapter within 20 days after receiving a verified complaint, the person making such complaint may bring an action under subs. (1) to (3) on his or her relation

in the name, and on behalf, of the state. In such actions, the court may award actual and necessary costs of prosecution, including reasonable attorney fees to the relator if he or she prevails, but any forfeiture recovered shall be paid to the state.

(5) Sections 893.80 and 893.82 do not apply to actions commenced under this section.

19.98 Interpretation by attorney general. Any person may request advice from the attorney general as to the applicability of this subchapter under any circumstances.

# **APPENDIX B**

## **SAMPLE OPEN MEETINGS LAW COMPLAINT FORM**

## VERIFIED OPEN MEETINGS LAW COMPLAINT

Now comes the complainant \_\_\_\_\_ and as and for a verified complaint pursuant to Wis. Stat. §§ 19.96 and 19.97, alleges and complains as follows:

1. That he is a resident of the \_\_\_\_\_ [town, village, city] of \_\_\_\_\_, Wisconsin, and that his or her Post Office Address is \_\_\_\_\_ [street, avenue, etc.] \_\_\_\_\_, Wisconsin \_\_\_\_\_ [zip].

2. That \_\_\_\_\_ [name of member or chief presiding officer] whose Post Office Address is \_\_\_\_\_ [street, avenue, etc.], \_\_\_\_\_ [city], Wisconsin, was on the \_\_\_\_\_ day of \_\_\_\_\_ 200\_, a \_\_\_\_\_ [member or chief presiding officer] of \_\_\_\_\_ designate official title of governmental body] and that such \_\_\_\_\_ [board, council, commission or committee] is a governmental body within the meaning of Wis. Stat. § 19.82(1).

3. That \_\_\_\_\_ [name of member or chief presiding officer] on the \_\_\_\_\_ day of \_\_\_\_\_, 200\_, at \_\_\_\_\_ County of \_\_\_\_\_, Wisconsin, knowingly attended a meeting of said governmental body held in violation of Wis. Stat. § 19.96 and \_\_\_\_\_ [cite other applicable section(s)], or otherwise violated those sections in that [set out every act or omission constituting the offense charged]:

4. That \_\_\_\_\_ [name of member or chief presiding officer] is thereby subject to the penalties prescribed in Wis. Stat. § 19.96.

5. That the following witnesses can testify to said acts or omissions:

Name	Address	Telephone
_____	_____	_____
_____	_____	_____
_____	_____	_____
_____	_____	_____

6. That the following documentary evidence of said acts or omissions is available:

7. That this complaint is made to the District Attorney for \_\_\_\_\_ County under the provisions of Wis. Stat. § 19.97, and that the district attorney may bring an action to recover the forfeiture provided in Wis. Stat. § 19.96.

WHEREFORE, complainant prays that the District Attorney for \_\_\_\_\_ County, Wisconsin, timely institute an action against \_\_\_\_\_ [name of member or chief presiding officer] to recover the forfeiture provided in Wis. Stat. § 19.96, together with reasonable costs and disbursements as provided by law.

STATE OF WISCONSIN    )  
  ) ss.  
COUNTY OF \_\_\_\_\_ )

\_\_\_\_\_ being first duly sworn on oath deposes and says that \_\_he is the above-named complainant, that \_\_he has read the foregoing complaint and that, based on his or her knowledge, the contents of the complaint are true.

\_\_\_\_\_  
COMPLAINANT

Subscribed and sworn to before me  
this \_\_\_\_ day of \_\_\_\_\_, 200\_.

\_\_\_\_\_  
Notary Public, State of Wisconsin  
My Commission: \_\_\_\_\_

**REFERENCE MATERIALS:  
CASES, OPINIONS, CORRESPONDENCE  
AND STATUTES CITED**



**REFERENCE MATERIALS:  
CASES, OPINIONS, CORRESPONDENCE  
AND STATUTES CITED**

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